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No. 82-452

IN THE

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN VON NEUMANN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

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Questions Presented.

Does the Due Process Clause of the Fifth Amendment of the United States Constitution require that person be granted a hearing within twenty-four (24) hours, or as soon thereafter as feasible in unusual circumstances, following seizure of the automobile in which he is traveling for failure to declare said automobile for customs purposes?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, John Von Neumann, prays that this Court deny the petition for writ of certiorari filed by petitioner to seek review of the judgment of the United States Court of Appeals, Ninth Circuit, decided November 2, 1981.

Opinion Below.

The opinion of the United States Court of Appeals, Ninth Circuit is reported at 660 F.2d 1319 and is printed in Appendix A hereto, *infra*, page A-1. Modifications to the opinion not contained in the opinion as reported are printed in Appendix B hereto, *infra*, page A-16.

Jurisdiction.

The jurisdiction of the Supreme Court is based upon 28 U.S.C. Section 1254(1).

Questions Presented.

Does the Due Process Clause of the Fifth Amendment of the United States Constitution require that a person be granted a hearing within twenty-four (24) hours, or as soon thereafter as feasible in unusual circumstances, following seizure of the automobile in which he is traveling for failure to declare said automobile for customs purposes?

Constitutional Provision and Statutes Involved.

The Fifth Amendment to the Constitution which provides in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

19 U.S.C. 1497 provides:

> "Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to a forfeiture and such person shall be liable to a penalty equal to the value of such article."

19 U.S.C. 1618 provides in pertinent part:

> "Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, . . . a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred with-

out willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just . . . ."

Statement of the Case.

In 1974, Respondent purchased a 1974 Jaguar Panther automobile in Switzerland (C.A. App. 33).[1]

In the fall of 1974, Respondent decided to import the automobile into the United States and had the automobile shipped to Canada through a customs broker in Switzerland and a customs broker in Canada. Respondent intended to take a Canadian vacation with a friend and to use the automobile for the vacation, but at the time the automobile arrived, the Respondent's friend was ill and the vacation plans had to be cancelled (C.A. App. 36).

On January 20, 1975 Respondent and a Mr. Paul R. Ginther went to Vancouver, B.C. to take delivery of the automobile. They were given a customs form A8A, Customs Cargo Control by Canadian Customs and instructed to deliver the documents to the Canadian Customs Station upon leaving Canada. Respondent and Mr. Ginther proceeded towards the Canadian/United States border and arrived at the check point at Blaine, Washington at approximately 5:00 p.m. on January 20, 1974 (C.A. App. 33).

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[1] "C.A. App." refers to the excerpt of record filed with the Court of Appeals. "Tr." refers to the transcript of the trial proceedings. For ease of reference, many references with respect to the facts of this case are to the uncontested and/or admitted facts set forth in the Pretrial Conference Order, pages 31-42 of the excerpt of record filed with the Court of Appeals.

Respondent and Mr. Ginther were confronted by a United States Immigration official, who in a span of approximately thirty seconds asked both passengers of the automobile several questions relating to citizenship, birthplace, purchase of firearms and alcohol, purchases in Canada, and one question with respect to declaration of articles for customs (C.A. App. 33, 57; Tr. 113-114).

Canadian Customs officials had alerted the United States Customs officials in Blaine that the automobile in question had been off loaded in Vancouver and may be traveling across the border into the United States (Tr. 110-111). The immigration official who had questioned the Respondent and Mr. Ginther had noted that the license plates on the automobile had matched the license plates described in the notice from Canadian Customs (Tr. 111-113).

The immigration official instructed Respondent to park the automobile and enter the building at the border. Respondent did as requested and upon entering the building was confronted by a United States customs officer who seized the automobile without giving Respondent any further opportunity to declare the automobile for customs purposes (C.A. App. 34; Tr. 42, 87, 162 and 169).

A criminal investigator interviewed Respondent that night and determined that there were no grounds for any criminal action (C.A. App. 34). At the request of the customs official, Respondent prepared a Petition for Remission or Mitigation of Forfeitures and Penalties Incurred. Respondent, through his attorneys, proceeded with the remission and mitigation, contending throughout that he was not seeking only remission or mitigation but a full refund of any and all penalties since there were no grounds for forfeiture or seizure in the first place. Within a couple of weeks, Respondent obtained release of the automobile by posting $24,500 without prejudice to any rights (C.A. App. 34, 57). In the

Petition, Respondent contended that he intended to deliver the Canadian Customs form to Canadian Customs prior to entering the United States and declaring the automobile, and was in fact looking for Canadian Customs when he arrived at the United States Custom Station. Though it was found by the trial court that Respondent failed to deliver the Canadian Customs form A8A to Canadian Customs himself, the form eventually was delivered by someone to Canadian Customs on January 20, 1975 (Tr. 32-33; C.A. App. 35, 57).

The initial decision on the Petition for Remission and Mitigation was made on February 25, 1975 and was that all penalties except $3,600 be returned to Respondent. This decision was appealed and upheld by the Regional Commission of Customs in San Francisco on April 14, 1975 (C.A. App. 17). Respondent proceeded to file a complaint against Petitioner in October of 1975 (C.A. App. 2). Trial took place on October 25 and 26, 1977. The court issued its Minute Order on June 30, 1978. Final judgment was entered on September 20, 1979. Respondent filed his notice of appeal on November 16, 1979 (C.A. App. 64). The Court of Appeals affirmed the District Court's decision only with respect to the finding that Respondent violated 19 U.S.C. Section 1497 by failing to declare the automobile. The Court of Appeals reversed the District Court's decision by holding that the Respondent's due process right to prompt consideration of his post-seizure claim of an improper seizure of his automobile, was violated.

REASONS TO DENY THE WRIT.

I.

The Court of Appeals' Decision Was Consistent With the Due Process Requirements of the United States Constitution.

The Court of Appeals cites several cases holding that the prompt initiation of judicial forfeiture proceedings is required in customs cases (Appendix A, *infra*, page A-8). Since in this case no judicial forfeiture proceedings were instituted, the Court of Appeals focused on the due process requirements for hearings following the seizure of automobiles. The Court of Appeals referred to the Second Circuit case of *Lee v. Thornton*, 538 F.2d 27 (2d Cir. 1976) (hereinafter "*Lee*") which involved the identical question.

In the case at bar, as in *Lee*, an automobile had been seized for failure to declare to customs, and remission and mitigation proceedings were instituted pursuant to 19 U.S.C. 1618. The Court of Appeals stated:

> "The purposes of the section 1618 remission process have been described as follows:
>
> '[F]irst, to permit an administrative review of the propriety of the seizure and the equities involved before any formal court action begins, and second, to give a claimant to seized property a quick, expeditious method of getting his property back without the necessity of hiring a lawyer to defend a court proceeding.'
>
> "*United States v. Eight (8) Rhodesian Stone Statues*, 449 F.Supp. 193, 202 (C.D. Cal. 1978). The need for prompt action is particularly acute where the seized property is an automobile, because 'both the necessities and amenities of life may depend upon the availability of an automobile when needed.' *Stypmann v. City and*

County of San Francisco, 557 F.2d 1338, 1343 (9th Cir. 1977). *See United States v. One 1971 Opel G.T.*, 360 F.Supp. 638, 641 (C.D. Cal. 1973) (automobile is a rapidly depreciating asset). In this case von Neumann was not only deprived of an asset, he was left without transportation at the border, a potentially serious consequence for many travelers. *See Lee v. Thornton*, 538 F.2d 27, 31 (2d Cir. 1976)." (Appendix A, *infra*, pages A-9-10).

It is therefore clear that the purpose of the post-seizure hearing is to determine both the question of whether the seizure itself was proper in the first place, and second, whether or not in the case of a proper seizure there should be some remission or mitigation consistent with the requirements of Section 1618. The Court of Appeals held that these questions must be resolved almost immediately when what is seized is the person's automobile.

Lee goes into detail with respect to the due process requirements, especially regarding seizure of automobiles. In footnote 4 of *Lee*, at page 32 thereof, the court cites numerous holdings of this Court regarding the fundamental requirements of having an opportunity for hearing at a meaningful time and in a meaningful manner before an individual can be deprived of a property interest. *Lee* expressly holds:

> "We hold that, in failing to provide appellants with an adequate opportunity to contest the detention of their property, the contested statutes as here applied violated appellants' fifth amendment right to due process. We reverse and remand. (538 F.2d 27, 30)
>
> "We are here concerned . . . with the need for immediate post-seizure hearings to avoid unreasonable continuation of the government custody of the vehicles.
>
> . . .
>
> "The manner in which the contested detention pro-

visions were applied here, however, we think failed to comply with the constitutional requirements of due process of law.

"In both cases vehicles were seized and held, penalties assessed and later mitigated on petition, and the vehicles released only on payment of the mitigated amounts, all without hearing. The statutes and regulations should have been interpreted to require an opportunity for prompt hearing. (538 F.2d 27, 31).

"[4] Balancing, as *Eldridge*[2] requires, the cost and inconvenience to the government against the seriousness of the deprivation, we hold that when vehicles are seized for forfeiture or as security, action on petitions for mitigation or remission should be required within 24 hours, with notice of the charge, and with opportunity to file a written response and to make an oral appearance and that, if requested, some kind of hearing on probable cause for the detention before an officer other than the one making the charge should be provided within 72 hours if the petition is not granted in full."

It is therefore clear from *Lee* that an immediate post-seizure hearing is required with respect to the seizure of automobiles, and that the remission and mitigation procedures of section 1618 provide the means for the holding of such hearings in customs seizure and forfeiture cases such as *Lee* and the case at bar. The fact that the Section 1618 process is discretionery is irrelevant, contrary to the claims of Petitioner. The process must still satisfy due process.

Likewise, the Court of Appeals in this case cited its decision in *Stypmann v. City and County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977) (hereinafter "*Stypmann*")

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[2]*Mathews v. Eldridge*, 424 U.S. 319 (1976).

holding that a statute allowing a possessory lien on vehicles in favor of towing companies for towing and storage fees was unconstitutional, because it did not provide for a prompt post-seizure hearing to determine probable cause for the seizure. The *Stypmann* decision relied heavily on *Lee*. In *Stypmann*, there was no such procedure as an administrative remission and mitigation. Notwithstanding, the reasoning of *Lee* was applied in the context that there must be a post-seizure proceeding. As stated by the Court of Appeals in this case, the hearing does not require all protections of a judicial proceeding, but there must be a prompt disposition of an administrative claim (Appendix A, *infra*, pagesA-12-13).

II.

Petitioner Has Made No Showing Whatsoever That the Court of Appeals' Decision Conflicts in Any Way With Prior Holdings of This Court.

Petitioner goes to great lengths to analogize the present case to the case of *United States v. Eight Thousand Eight Hundred Fifty Dollars ($8,850) in United States Currency*, cert. granted, No. 81-1062 (March 22, 1982) (hereinafter "*$8,850*"). Said case is before this Court on a petition for writ of certiorari to the Ninth Circuit. The *$8,850* case arose out of a situation in which the principal party was indicted for and found guilty of knowingly and wilfully making false statements to a customs officer. After criminal prosecution, the government filed its forfeiture action eighteen (18) months after seizure of currency. The Court of Appeals found that the eighteen (18) month delay for instituting a forfeiture was a denial of due process pointing out that the delay was caused entirely by the government. More importantly, the Court held that the claimant need not show prejudice in addition to the unjustified delay in order to

prevail on a due process claim. Since this Court has granted certiorari in *$8,850*, Petitioner attempts to draw parallels between *$8,850* and the case at bar. The *$8,850* case is certainly distinguishable from the present case for the following reasons:

1. The case at bar involves seizure of an automobile and the necessity for a hearing which does not necessarily need to comply with all of the requirements of a judicial proceeding. The *$8,850* case involves a delay in instituting a judicial forfeiture after seizure of currency.

2. An automobile is a wasting asset and serves a unique function to its owners, especially at a remote border point.

3. There is substantial prejudice suffered by the Respondent in that he had his property, the automobile, confiscated, was left without transportation at a remote border point, all without a hearing until almost three (3) years after the seizure. The Court of Appeals never held that Respondent did not have to show prejudice or that Respondent was not prejudiced.

4. In the case at bar there was no criminal prosecution. To the contrary, an investigator decided that there was no basis for criminal prosecution.

In addition, with respect to the question of prejudice, the Court of Appeals held as a matter of law that one is prejudiced when deprived of the use of his automobile at a remote border point.

In the case at bar, the government merely needed to prove that the automobile was brought into the United States without the required declaration, to justify the seizure. The government bore no burden with respect to proving any intention on the part of the Respondent to improperly introduce the automobile into the United States. It only had to prove a

technical violation of the 19 U.S.C. 1497 (Appendix B, *infra*, pages A-16-17).

Since the Petitioner's burden was so light and the consequences of the seizure so serious, Respondent was greatly prejudiced by not having the matter immediately heard to determine if he was given a proper opportunity to declare and if he should lose possession of his automobile under the circumstances. At the time the automobile was seized, Respondent had been asked numerous questions, only one of which was whether Respondent had anything to declare for customs. The questions were asked by an immigration official who himself believed that the customs officer would give Respondent an opportunity to declare the automobile. The immigration official did not even know if the automobile had to be declared (Tr. 121-123). Respondent contended that he did not understand the question as giving him a proper opportunity to declare since he was looking for Canadian Customs. Now eight (8) years later Respondent is still waiting for a final decision.

In addition, had there been an immediate post-seizure hearing, many questions may have been clarified while the facts were still fresh in everyone's minds and the matter may have proceeded no further. Instead Respondent was left at a remote border point without any means of transportation and had to post the full value of the automobile to have the automobile released several weeks later. All of this took place in a context where the border officers had been put on the lookout for a particular automobile and yet asked only one question relating to that automobile. Furthermore, the trial court found that the Respondent did not stop by Canadian Customs and deliver the documents (C.A. App. 56). It was an uncontested fact that the documents had been delivered to Canadian Customs (C.A. App. 35). The question of how the documents got to Canadian Customs

was never answered. Respondent was prejudiced by not having these questions raised and the situation examined at the time of the seizure.

The Petitioner next stresses two aspects of this case. Petitioner claims, first, that what is involved is a delay in a purely discretionary administrative proceeding; and second, that Respondent has no property interest involved in this case.

As discussed above, the first point is without merit. The fact that this case involves a discretionary administrative procedure is not relevant to the question of whether or not an immediate post-seizure hearing is required. The hearing is for the purpose of deciding both the propriety of the seizure in the first place, and whether or not there are circumstances justifying a return of property and some mitigation of the penalty. As the court in *Lee* held, there should be some action on the remission or mitigation petition within twenty-four (24) hours and, if requested, a probable cause hearing before an officer other than the one making the charge within seventy-two (72) hours. The fact that the remission and mitigation proceeding is the process most suited for such a hearing in this case, does not affect the fact that the due process clause requires there to be a hearing. If the statute did not provide for a remission and mitigation proceeding, there would have to be a hearing through another means.

Petitioner next tries to analogize this case to numerous cases involving prisoners' rights. Petitioner makes reference to *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), *Connecticut Board of Pardons v. Dumshat*, 452 U.S. 458 (1981) and several other cases involving prison inmates. In *Greenholtz* prisoners' claimed they had been unconstitutionally denied parole by the Nebraska Parole Board. This Court held that a due

process protection is not created whenever a state provides the possibility of parole since this is no more than a mere hope that a benefit will be obtained. If there is an expectancy, there is some entitlement to some process under the due process clause. In *Dumshat* this Court held that a state felon's expectancy that a lawfully imposed sentence will be commuted was no more substantial than the hope that he would be transferred to another prison.

Petitioner tries to analogize these cases to the present case by stating that just as a prisoner has no property interest in hoping for parole or commutation of sentence, Respondent has no property interest in having forfeiture remitted or mitigated. Such reasoning ignores the fact that Respondent has a substantial property interest in his automobile and a substantial liberty interest in not being detained without his automobile. He further has an expectancy that his automobile will not be seized.

Furthermore, Respondent has committed no crime nor, as this Court stated in *The One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 234 (1972) did the government have to show, nor has the government in this case attempted to show, that Respondent had any intent to violate any laws of the United States. The District Court found and the Court of Appeals affirmed merely that Respondent failed to declare his car at the border. Furthermore, both the immigration officer who questioned Respondent and the customs officer who seized the automobile testified that they had no reason to believe that Respondent intended to avoid the customs laws (Tr. 123, 164).

Petitioner is comparing Respondent to a person convicted of a felony. Respondent is not in the position of one who has been tried and found guilty after a constitutionally valid process of arrest, arraignment, trial, conviction and right to appeal. Petitioner is arguing that Respondent should be

denied his trial in the first place. An extension of Petitioner's argument would eliminate the requirement that even forfeiture proceedings ever be instituted after a seizure under the Customs laws.

Petitioner states that a person who attempts to smuggle a vehicle or contraband across the border should be held to assume the risk of any inconvenience. It was not even remotely suggested by Petitioner at trial or on appeal, or by the courts below that Respondent ever attempted to smuggle a vehicle or contraband across the border.

Petitioner finally attempts to justify a delay in a post-seizure hearing by submitting to this Court a declaration of Donald W. Lewis, Director of the Office of Regulations and Rulings, Office of Commercial Operations United States Customs Service. The arguments of Mr. Lewis were neither raised at the trial court nor at the hearing before the Court of Appeals. Nevertheless, the argument of Mr. Lewis is that it is difficult to reach a final decision on remission and mitigation within twenty-four (24) hours, and therefore most petitions will have to be denied.

The Court of Appeals already answers these contentions. The requirement is merely that some action be taken within twenty-four (24) hours and a claimant be allowed to make an oral appearance pursuant to the requirements of *Lee*. If it is not possible for action to be taken within twenty-four (24) hours, the Court of Appeals allows a delay and specifically states that in unusual circumstances there can be reasonable extensions of time. More importantly, a claimant may waive further delays. Therefore if a decision cannot be adequately made within twenty-four (24) hours, the petitions do not automatically have to be decided adversely to the petitioners, with a resulting deluge of judicial forfeiture actions, as contended by Mr. Lewis. If one whose automobile is seized cannot obtain satisfactory relief after

the initial prompt post-seizure hearing, he can agree to allow the government to continue its investigation prior to denying the petition. It would seem unlikely that a person faced with the prospect of a forfeiture proceeding after he has had the opportunity to have a hearing on his seizure, would not agree to waive further delays in order to allow the mitigation proceeding to proceed further if circumstances so justify.

Conclusion.

There is no compelling reason for this Court to review the Court of Appeals' decision. Said decision is consistent with the holdings of other circuits regarding the same issue and provides a correct and fair procedure in cases involving seizure of automobiles. The case at bar cannot be compared to cases involving prisoners and cases holding that prejudice does not have to be shown, as Petitioner has attempted to do. The issues raised by the case at bar are limited to the situation of the seizure of an automobile for failure to declare where there is no question of any criminal wrongdoing or fraudulent intent on the behalf of the person whose automobile is seized.

In light of the foregoing it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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Attorneys for Respondent,
John Von Neumann.

APPENDIX A.

Opinion of the United States Court of Appeals, Ninth Circuit.

VON NEUMANN v. UNITED STATES.

John Von Neumann, Plaintiff-Appellant, v. United States of America; Secretary of the Treasury; Commissioner of Customs; and District Director of Customs for the Port of Seattle, District 30.01, Defendants-Appellees. No. 79-3761.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 3, 1981. Decided Nov. 2, 1981.

Appeal from the United States District Court for the Central District of California.

Before TANG and BOOCHEVER, Circuit Judges, and PRICE,* District Judge.

BOOCHEVER, Circuit Judge.

This appeal presents the issue of whether the procedures followed by the United States Bureau of Customs (Customs) in processing an administrative petition for remission or mitigation of the forfeiture of an automobile seized at the border for failure of the owner to make the required declaration, were consistent with due process. John von Neumann's foreign-bought car was seized by Customs officials at the Canadian-United States border after he failed to declare the car upon entering the United States. On the day of the seizure, von Neumann filed an administrative claim for remission or mitigation, and later recovered the car after posting a bond as security. Over a month after the petition

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*Honorable Edward Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

was filed, Customs remitted $20,900 to von Neumann, but retained $3,600 as a penalty.

Von Neumann filed a complaint in district court, challenging the penalty and the procedures used to assess it. The district court found that von Neumann violated 19 U.S.C. § 1497 by failing to declare the car and thus the seizure was proper. Additionally, the court found that the remission procedure was proper. We agree that seizure was proper under section 1497, but find fatal due process violations in the remission procedure.

FACTS

In 1974, von Neumann purchased a 1974 Jaguar Panther automobile in Switzerland and shipped it to Vancouver, Canada. Prior to shipment, von Neumann registered the car in California and obtained California license plates. On January 20, 1975, von Neumann picked up the car in Vancouver and obtained a release from Canadian Customs to take possession. Canadian Customs officials gave von Neumann form A8A, which authorized transportation of the car to the border, and instructed him to deliver the form to the Canadian Customs border station before leaving the country.

Von Neumann and a friend arrived at the United States border checkpoint at Blaine, Washington at 5:00 p.m. on January 20. The Blaine checkpoint is across the highway and slightly south of the Canadian border station. The highway approaching the Blaine Station is a multilane highway with several turnoffs for the Canadian Customs building. Von Neumann testified that he inadvertently passed the Canadian station because of poor visibility and inadequate directions. For whatever reasons, Von Neumann arrived at the Blaine checkpoint without having delivered form A8A to Canadian Customs.

At the Blaine checkpoint, von Neumann and his passenger were briefly questioned by United States Immigration Officer Perkins.[1] Canadian Customs officials had earlier alerted United States Customs that von Neumann's car would be crossing the border, and Perkins matched the description to the car before questioning the occupants. Perkins asked questions relating to citizenship, and specifically asked von Neumann whether he had anything to declare. When von Neumann failed to declare the automobile, Perkins asked him into the checkpoint station and referred the case to Customs Inspector Morrison. Upon being asked why he had not declared the car, von Neumann explained that he did not think he was required to declare it. Morrison then seized the vehicle pursuant to 19 U.S.C. § 1497.[2]

Immediately after the car was seized, von Neumann prepared a "Petition for Remission or Mitigation of Forfeiture and Penalties Incurred," *see* 19 U.S.C. § 1618,[3] explaining

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[1]Harley Perkins was an Inspector for the Immigration and Naturalization Service, but had been serving as a designated Customs Officer since August 16, 1974. See 19 U.S.C. § 1401(i). His designation form indicates that he was to receive training necessary to serve as a Customs Inspector for arriving vehicles, aircraft, and vessels.

[2]19 U.S.C. § 1497 provides:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article.

[3]19 U.S.C. § 1618 provides in part:

> Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

that he had intended to deliver the Canadian Customs papers to Canadian Customs but had mistakenly arrived at United States Customs instead. After filing the petition, von Neumann arranged for other transportation into the United States, and left his car with Customs.

On February 3, 1975, von Neumann posted a bond for $24,500, the value of his car, and Customs returned the vehicle.[4] On February 25, 1975, the Seattle Director of the Bureau of Customs[5] informed von Neumann that the penalty for failing to declare the car was being reduced to $3,600, and therefore $20,900 would be refunded. Von Neumann requested administrative review of this determination, and on April 14, 1975, the Regional Commissioner of Customs in San Francisco upheld the $3,600 penalty assessment.

Having exhausted his administrative remedies, von Neumann filed a complaint in district court on October 14, 1975, seeking: (a) return of the $3,600; (b) injunctive relief to prevent Customs from placing his name on a computer list of violators; (c) a declaration that the seizure and penalty were unlawful.[6] The district court found that von Neumann

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[4]Customs officials have the discretion to release a seized vehicle if the person claiming an interest has a "substantial interest therein." 19 U.S.C. § 1614. In this case Customs required a bond for what it considered the value of the car, as security to cover the penalty assessed. *See* 19 C.F.R. §§ 162.41(a), 162.43, 162.44(b) (1980).

[5]By statute, the Secretary of the Treasury acts on petitions for remission or mitigation. 19 U.S.C. § 1618. This authority has been delegated to district directors in cases where the total value of the merchandise forfeited does not exceed $25,000. 19 C.F.R. § 171.21 (1980). The estimated value of von Neumann's car, $24,500, thus fell within the district director's regulatory authority.

[6]Customs filed a counterclaim requesting recovery of the full $24,500 in accordance with 19 U.S.C. § 1497. This claim was apparently based on the argument that since Customs has complete discretion over a petition for remission, von Neumann's challenge reopened the determination and Customs could now assess the full penalty value for the failure to declare. *See United States v. One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976). The district court denied Custom's counterclaim, and Customs has not appealed that aspect of the judgment.

violated 19 U.S.C. § 1497, and therefore seizure of the car was proper. The court also found that the remission and mitigation procedures were proper, and entered judgment for the government. Von Neumann appeals, challenging the imposition of the penalty as well as the procedures followed by Customs.

DISCUSSION

I. Violation of 19 U.S.C. § 1497

Von Neumann contends that the district court erred in finding that he violated section 1497, because he was never given an adequate opportunity to declare the car. The district court's determination that von Neumann was given an adequate opportunity to declare and yet failed to declare his car is a factual one, which we will not overturn unless clearly erroneous. *United States v. Wagner*, 434 F.2d 627, 628-29 (9th Cir. 1970). *See Vesey v. United States*, 626 F.2d 627, 629 (9th Cir. 1980). The record fully supports the district court's conclusion that von Neumann attempted to introduce his car into United States commerce without declaring it, despite an opportunity to do so.

Officer Perkins testified that he asked von Neumann if he had purchased or acquired anything outside of the United States that he was bringing back into the country,[7] and then asked if he had anything to declare. Von Neumann thus had two opportunities to declare the car, yet failed to do so.[8]

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[7]Von Neumann claims that Perkins asked whether he had purchased anything in Canada, and he responded negatively because the car was purchased in Switzerland. Perkins testified that his questioning was not limited to purchases in Canada, but included acquisitions anywhere outside the United States. The district court apparently credited Perkins' testimony.

[8]We note also that von Neumann was an experienced importer who had been shipping automobiles between Europe and the United States for over twenty years, and had personally crossed international borders "innumerable times." In spite of this background, von Neumann failed to mention the car after a specific Customs request.

It is irrelevant whether von Neumann was looking for the Canadian Customs building and did not intend to enter the United States without declaring the car. As the Supreme Court has held,

> "[t]o succeed in a forfeiture action under § 1497 . . . the Government need only prove that the property was brought into the United States without the required declaration; the Government bears no burden with respect to intent."

One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 234, 93 S.Ct. 489, 491, 34 L.Ed.2d 438 (1972). In demonstrating that von Neumann failed to declare the car, Customs has shown that the car was subject to forfeiture and that its owner is "liable to a penalty equal to the value of such article [the undeclared car]." 19 U.S.C. § 1497.

Von Neumann argues that because Customs regulations required a written declaration for articles exceeding $25 in value, his oral statement failing to declare the car did not constitute a violation of section 1497. 19 C.F.R. § 148.-12(b)(2) (1980). This argument is without merit. Perkins was not under any obligation to request a written declaration until von Neumann had orally declared the car, nor did von Neumann ever attempt to submit a written declaration.

Von Neumann's final argument is that he was entitled to amend his declaration up until the time his baggage was searched. Although an amendment is proper under Customs regulations, the undeclared item must be "brought to the attention of the examining officer by the passenger." 19 C.F.R. § 148.16(a) (1980). Von Neumann failed to do this. Moreover, Customs was not required to search his baggage. The statute states that customs officers "*may* cause an examination to be made of the baggage . . . ." 19 U.S.C. § 1496 (emphasis added). Section 1496 does not provide protection from seizure up until the time a formal baggage

search is conducted. The "search" took place when Officer Perkins observed the car and matched it to the description provided by Canadian Customs.

The district court's finding that von Neumann failed to declare his car, after an adequate opportunity to do so, is not clearly erroneous. We therefore affirm the district court determinations that von Neumann violated section 1497 and that seizure of the vehicle was proper.[9]

II. Due Process Challenge to the Administrative Procedure under 19 U.S.C. § 1618.

A. Petition for Remission or Mitigation

Under 19 U.S.C. § 1618, a person whose property is seized and subject to forfeiture may file an administrative petition for remission or mitigation of the penalty. *See* note 3, *supra*. In cases where the forfeiture value does not exceed $25,000, the district director may remit or mitigate the penalty "under the law and in view of the circumstances, [as] he shall deem appropriate . . . ." 19 C.F.R. § 171.21 (1980). The administrative remission process is independent of a judicial action for forfeiture, which must be initiated promptly. 19 U.S.C. §§ 1602-04; *Seguin v. Eide*, 645 F.2d 804, 808 (9th Cir. 1981); *United States v. One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977). In this case, judicial forfeiture proceedings were never initiated; we are only concerned with the propriety of the administrative procedures followed by Customs.

The substantive disposition of remission petitions is committed to the Customs Bureau's discretion, and we will not review its decision on the merits of a claimant's petition.

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[9]Because we affirm this portion of the district court judgment, von Neumann is not entitled to have his name removed from Customs' computer list of persons who have failed to declare merchandise, as requested in his prayer for injunctive relief.

United States v. One 1972 Mercedes-Benz 250, 55 F.2d 1233, 1236 (9th Cir. 1976). In this case, however, von Neumann is challenging the procedures utilized to reach the substantive decision. Specifically, he claims that the delay of over a month in acting on his petition was a denial of 4his fifth amendment right to due process.[11]

B. Due Process Right to a Prompt Determination

The cases interpreting 19 U.S.C. §§ 1602-04, requiring prompt initiation of judicial forfeiture proceedings, make it clear that due process depends on the circumstances of each individual case. *See e.g., Seguin v. Eide*, 645 F.2d 804, 808-09 (9th Cir. 1981) (delay of almost 5 months excessive); *United States v One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977) (delay of 11 months excessive); *United States v. One 1973 Buick Riviera Automobile*, 560 F.2d 897, 901 (8th Cir. 1977) (delay of 5 months justified). The rule in this circuit is that filing of a petition

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[11]Because border seizure is an "extraordinary situation" requiring immediate action, the ordinary due process requirements of notice and hearing prior to deprivation of property are not required. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-80, 94 S.Ct. 2080, 2089-2090, 40 L.Ed.2d 452 (1974); *Ivers v. United States*, 581 F.2d 1362, 1367-68 (9th Cir. 1978). Customs argues that this was the only issue before the district court, and therefore von Neumann is precluded from arguing that a prompt post-seizure hearing is required.

The pre-trial conference order indicates that one of the issues of law to be considered was:

> "Is the procedure which was instituted against Plaintiff and the Automobile, whereby the Automobile may be forfeited and seized, and then remission and mitigation proceedings begun, an unconstitutional violation of the due process clause of the Fifth Amendment to the United States Constitution." The issue is framed in sufficiently general terms to include both pre- and post-seizure due process requirements. Moreover, the case of *Lee v. Thornton*, 538 F.2d 27 (2d Cir. 1976), which found post-seizure administrative delay to be a due process violation, was cited and discussed below. We therefore conclude that the propriety of the post-seizure administrative delay is properly before this court.

for remission under section 1618 does not excuse Customs from its burden of prompt referral for judicial forfeiture. *Ivers v. United States*, 581 F.2d 1362, 1372 (9th Cir. 1978).

By contrast, there has been little interpretation of the due process requirements for the remission procedure itself, when judicial proceedings have not been initiated.[11] This is perhaps in part because the statutory language authorizing remission does not place any time restrictions on Customs, while the judicial referral statutes use the terms "immediately," "promptly," and "forthwith." *Compare* 19 U.S.C. § 1618 *and* 19 C.F.R. §§ 171.11-171.33 (1980) *with* 19 U.S.C. §§ 1602-04. The absence of statutory language does not eliminate the constitutional requirement of due process, however. The informal, remedial nature of the administrative petition makes rapid processing essential.

The purposes of the section 1618 remission process have been described as follows:

> [F]irst, to permit an administrative review of the propriety of the seizure and the equities involved before any formal court action begins, and second, to give a claimant to seized property a quick, expeditious method of getting his property back without the necessity of hiring a lawyer to defend a court proceeding.

United States v. Eight (8) Rhodesian Stone Statues, 449 F.Supp. 193, 202 (C.D. Cal. 1978). The need for prompt action is particularly acute where the seized property is an

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[11] A panel of this court recently held that the owner of a vehicle seized for a drug violation under 21 U.S.C. § 881(a) did not have a due process right to a probable cause hearing within 72 hours of seizure. *United States v. One 1971 BMW 4-Door Sedan*, 652 F.2d 817, at 819-820 (9th Cir. 1981). The panel found that the strong government interest in enforcing narcotics laws outweighed the individual interest at stake. The *One 1971 BMW* panel was not faced with a challenge to the promptness of remission procedures, since a petition for remission was never filed. *See* at 821-822.

automobile, because "both the necessities and amenities of life may depend upon the availability of an automobile when needed." *Stypmann v. City and County of San Francisco*, 557 F.2d 1338, 1343 (9th Cir. 1977). *See United States v. One 1971 Opel G.T.*, 360 F.Supp. 638, 641 (C.D. Cal. 1973) (automobile is a rapidly depreciating asset). In this case von Neumann was not only deprived of an asset, he was left without transportation at the border, a potentially serious consequence for many travelers. *See Lee v. Thornton*, 538 F.2d 27, 31 (2d Cir. 1976).

Lee is the only case directly addressing the due process argument advanced by von Neumann. Lee was accused of using his van to bring undeclared persons, merchandise, and marijuana into the country. The van and merchandise were seized, and Lee was assessed a penalty equal to the value of the van. He was informed that the van and merchandise were subject to forfeiture and that he could file a petition for remission or mitigation under section 1618. Lee filed a petition within a few days of seizure and recovered the van after paying $100, the amount of the reduced penalty.[12]

The *Lee* Court reversed the penalty assessment because Customs failed to provide Lee with a prompt hearing on his remission petition. The court first balanced the serious nature of the individual property deprivation against the inconvenience to government in providing a prompt determination of the legality of the detention. 538 F.2d at 33. An important factor in the individual's interest is the hardship that even a temporary deprivation of an automobile

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[12] *Lee* was a consolidated appeal, and the factual circumstances of appellant Rich's case were similar to Lee's. Although seizure in *Lee* was pursuant to 19 U.S.C. §§ 1460, 1594, and 1595a, and in the instant case was pursuant to 19 U.S.C. § 1497, *Lee* was an interpretation of the remission statute at issue here: 19 U.S.C. § 1618. 538 F.2d at 31.

might cause. *See Stypmann*, 577 F.2d at 1343; *One 1971 Opel G.T.*, 360 F.Supp. at 641. On the other hand, once a seizure is accomplished, the government's justifications for delaying a hearing are not compelling. *Wiren v. Eide*, 542 F.2d 757, 761 n.6 (9th Cir. 1976). After balancing the competing interests, the *Lee* court held:

> [W]hen vehicles are seized for forfeiture or as security, action on petitions for mitigation or remission should be required within 24 hours, with notice of the charge, and with opportunity to file a written response and to make an oral appearance and that, if requested, some kind of hearing on probable cause for the detention before an officer other than the one making the charge should be provided within 72 hours if the petition is not granted in full.

538 F.2d at 33.

Although not bound by the Second Circuit's holding in *Lee*, we find its reasoning persuasive. This court expressly relied on the *Lee* rationale to invalidate a California towing and possessory lien statute[13] in *Stypmann v. City & County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977). The statute in *Stypmann* granted towing companies, who had possession of a car because of a traffic violation, a possessory lien on the vehicle to insure recovery of towing and storage fees. The court held that this statute could not withstand a due process attack because it did not provide for a prompt post-seizure hearing to determine probable cause for the seizure. The *Stypmann* court stated:

> A five-day delay in justifying detention of a private vehicle is too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle. *Lee v. Thornton, supra*, 538 F.2d

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[13]Cal.Veh. Code § 22851.

> at 33, a case involving seizure and detention of automobiles in comparable circumstances, held that due process required action on a petition for rescission [remission?] or mitigation within 24 hours, and, if the petition was not granted in full, a hearing on probable cause within 72 hours.

Id. at 1344 (footnote omitted).[14] *Lee* was also cited for the propositions that a car is an important individual asset, *id.* at 1342 n.8 & 1344 n.22, and that a court must balance governmental and individual interests to determine due process, *id.* at 1342.

The government contends that *Ivers v. United States*, 581 F.2d 1362 (9th Cir. 1978), stands for the proposition that the due process requirements of prompt notice and hearing only apply to judicial forfeiture proceedings, not administrative proceedings under 19 U.S.C. § 1618. The issue in *Ivers*, however, was whether the filing of an administrative petition operated as a waiver of a claimant's right to a prompt forfeiture action. The court held that it did not. *Id.* at 1370. In dicta, the *Ivers* court stated:

> Administrative consideration of a claimant's petition for remission is not governed by any statutory or regulatory requirement of promptitude. Nor does it not afford a claimant the full panoply of due process rights inherent in a judicial proceeding. Remission being a matter of legislative grace, the exercise of the Secretary's discretion is not reviewable by the courts.

Id. at 1371. The tone of this statement indicates that the word "not" in the second sentence may be a misprint. It seems that the court was merely emphasizing the informal nature of the administrative process. We agree that an ad-

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[14] *Stypmann* held that five days was too long of a delay, but did not establish what time period would be proper. 557 F.2d at 1344-45.

ministrative hearing does not require all the protections of a judicial hearing, but we believe a claimant is entitled to prompt disposition of an administrative claim.

The balance of the *Ivers* opinion suggests that due process does require a prompt resolution of administrative claims. The court noted that administrative proceedings are informal and inexpensive, and will often obviate the need for judicial action since remission petitions are frequently granted. *Id.* at 1370. If time limits are not imposed on the administrative process, the government might be forced to bring a judicial action prior to the completion of the administrative claim. Once a case is referred for judicial action, the administrative proceedings on a petition for remission must cease. 19 C.F.R. § 171.2(a) (1980). Therefore delay in ruling on a claimant's petition could force a more cumbersome and time-consuming judicial forfeiture action. *See Ivers*, 581 F.2d at 1370, *United States v. Eight (8) Rhodesian Stone Statues*, 449 F.Supp. 193, 202 (C.D.Cal. 1978). The rationale of the *Lee* case is further supported by cases from this circuit. In *United States v. One 1970 Ford Pickup*, 564 F.2d 864 (9th Cir. 1977), we stated: "[f]rom the standpoint of the claimant, the stage of the procedures at which excessive delay occurs is irrelevant. His concern, and the concern of the statutory scheme, is the quick and efficient determination of the property rights in the confiscated vehicle." *Id.* at 866 (referring to various stages of the judicial forfeiture procedure). The United States District Court for the Central District of California, citing *Lee*, noted that "[a] growing number of decisions enunciate the proposition that *both* the adjudication of the administrative claim and the filing of a court action when required, must be speedily done." *Eight (8) Rhodesian Stone Statues*, 449 F.Supp. at 200 (emphasis added). *See also Pollgreen v. Morris*, 496 F.Supp. 1042, 1051-53 (S.D.Fla. 1980) (invalidating sei-

zure of vessels used in Cuban "Freedom Flotilla" for failure to provide prompt post-seizure hearings; relying on *Lee* and *Stypmann*); *F/V American Eagle v. State*, 620 P.2d 657, 666-67 (Alaska 1980) (citing *Lee* and *Stypmann* for the proposition that a post-seizure hearing must be prompt even when the government interest is "urgent"). We therefore adopt the *Lee* rationale and hold that due process requires the Customs Bureau to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C. § 1618. The one month delay in processing von Neumann's petition does not conform to this standard.

C. What Constitutes a Prompt Determination

We have concluded that Customs must act on a remission petition promptly and that the one month delay in processing von Neumann's petition was unreasonable. This court has not yet formulated specific standards, but we are guided by the *Stypmann* court, which held that a five-day delay in providing a hearing violated due process. *Stypmann v. City and County of San Francisco*, 557 F.2d 1338, 1344 (9th Cir. 1977). Although Customs regulations provide specific requirements for remission petitions, including a 60 day limitation on filing a petition, the regulations do not place any time constraints on administrative consideration of a petition. 10 C.F.R. § 171.12(b) (1980); *See generally* 19 C.F.R. §§ 171.11-171.33 (1980).

In the absence of any appropriate regulatory provisions, we find that the imposition of guidelines is necessary to ensure the due process rights of administrative claimants. No showing has been made that the time limits set by the Second Circuit in *Lee* have proved unreasonably burdensome. We hold that in cases involving vehicles of transportation within a district director's authority under 19

C.F.R. § 171.21 (1980),[15] the director must ordinarily, depending upon the nature of the article seized,[16] act on a petition for remission or mitigation within 24 hours of receipt. The claimant must be allowed the opportunity to make an oral appearance to argue his or her claim. Because the administrative delay in processing von Neumann's petition violated his due process rights, we reverse and remand with instructions to enter judgment for von Neumann in the amount of $3,600 plus costs. *See Lee*, 538 F.2d at 33.

CONCLUSION

The district court finding that von Neumann violated 19 U.S.C. § 1497 by failing to declare his car is not clearly erroneous, therefore the seizure of his car was proper. The delay in processing von Neumann's petition for remission or mitigation, however, violated his due process right to prompt consideration of his claim. Because we hold that Customs must ordinarily act on a petition for remission within 24 hours of receipt, we reverse and remand with instructions to enter judgment for the plaintiff.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

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[15]The district director has authority to act in cases involving a total value of merchandise not exceeding $25,000. *See* note 5 *supra*. The due process requirements for cases involving greater value than $25,000, which are decided by the Commissioner of Customs, are not before us. *See* 19 C.F.R. § 171.11(a) (1980). We note that the greater the value of the merchandise, the greater the potential for a burden on individual rights. On the other hand, the administrative machinery may need more time to operate when the district director is not authorized to act.

[16]Unlike the court in *Lee*, we have set forth times to be followed under ordinary circumstances. We do not preclude the possibility of some reasonable extension being permissible if unusual circumstances, such as holidays or unavailability of needed personnel, require some brief delay. A claimant might also waive delays in the administrative process.

APPENDIX B.

Modifications to the Opinion. Order.

United States Court of Appeals for the Ninth Circuit.

[Filed May 1, 1982]. No 79-3761. DC No. 75-3453-RF.

John Von Neumann, Plaintiff-Appellant, v. United States of America; Secretary of the Treasury; Commissioner of Customs; and District Director of Customs for the Port of Seattle, District 30.01, Defendants-Appellees.

Before: TANG and BOOCHEVER, Circuit Judges, and PRICE,* District Judge.

The Opinion in the above-entitled case is modified as follows:

(1) At page 5512 of the slip opinion, second paragraph, left column, the third sentence is amended to read:

> We hold that in cases involving vehicles of transportation within the district director's authority under 19 C.F.R. § 171.21 (1980),[15] the director should whenever feasible[16] act on a petition for remission or mitigation within 24 hours of receipt.

(2) Footnote 16 is amended to read as follows:

> [16]Unlike the court in *Lee*, we have set forth times to be followed under ordinary circumstances. We do not preclude the possibility of some reasonable extension being permissible if unusual circumstances, such as holidays or unavailability of essential information or of needed personnel, require some brief delay. A claimant might also waive delays in the administrative process. We further do not foreclose the promulgation of

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*Honorable Edward Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

a regulation setting forth any appropriate standard in accordance with the principles set forth in this opinion.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.